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BEFORE THE ARIZONA CORPORATION COMMISSION

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Chairman
WILIAM A. MUNDELL
Commissioner
JEFF HATCH-MILLER
Commissioner
MIKE GLEASON
Commissioner
KRISTIN K. MAYES
Commissioner

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Arizona Corporation Commission
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IN THE MATTER OF THE STAFF'S REQUEST
FOR APPROVAL OF COMMERCIAL LINE
SHARING AGREEMENT BETWEEN QWEST
CORPORATION AND COVAD
COMMUNICATIONS COMPANY

Docket No. T-03632A-04-0603
T-01051B-04-0603

STAFF'S OPPOSITION TO QWEST'S MOTION TO DISMISS

I. INTRODUCTION

On May 14, 2004, Qwest Corporation ("Qwest") filed a four page agreement with the Commission entitled "Commercial Line-Sharing Amendment to the Interconnection Agreement" under Section 252 of the Telecommunications Act of 1996 ("Federal Act"). The Amendment sets forth the terms and conditions governing Qwest's provision of line-sharing to Covad for orders placed through October 1, 2004, pursuant to the transitional rules created by the FCC's Triennial Review Order ("TRO"). See, 47 C.F.R. 51.319(a)(i)(B).

Qwest also submitted a second agreement to the Commission which governs Qwest's provision of line sharing to Covad Communications Company ("Covad") for orders placed after October 1, 2004. However, Qwest submitted this agreement for informational purposes only. Qwest argues that it does not have to file this second agreement with the Commission under Section 252 of the Federal Act since Qwest is not required by the FCC's TRO to provide line-sharing to a CLEC's new customers after October 1, 2004.

Staff counsel wrote to counsel for Qwest and Covad on May 28, 2004, setting forth Staff's position that the second agreement was an "interconnection agreement" and needed to be filed with

1 the Commission under Section 252 of the Federal Act.¹ Qwest responded that it was not required to
2 file the second agreement with the Commission because it does not “create any terms or conditions
3 for services that Qwest must provide under Sections 251(b) and (c)”.² Qwest Motion at p. 2. Staff
4 replied that consistent with its position, it was going to treat the second agreement as an
5 interconnection agreement and would request that a Docket be opened to process the agreement as
6 any other interconnection agreement filed with the Commission. On August 13, 2004, Staff filed a
7 memo and the agreement with Docket Control and requested that a Docket be opened for review of
8 the agreement.³ The following is Staff’s opposition to Qwest’s motion to dismiss Staff’s request for
9 review of the agreement under Section 252.

10 **II. DISCUSSION**

11 **A. Section 252(e) of the Federal Act Requires That “Any” Interconnection** 12 **Agreement be Filed With the State Commission.**

13 Section 252(e) of the Federal Act provides as follows:

14 “(1) APPROVAL REQUIRED.-- Any interconnection agreement adopted by
15 negotiation or arbitration shall be submitted for approval to the State
16 commission. A State commission to which an agreement is submitted shall
approve or reject the agreement, with written findings as to any deficiencies.”
(Emphasis added).

17 Qwest argues that Section 252(e)’s requirement to file “any” interconnection agreement with
18 the State commission for approval is qualified by Section 252(a)(1) to mean only those agreements
19 which contain ongoing obligations under Section 251(b) and (c) of the Federal Act. However, if it
20 was Congress’ intent to qualify the Section 252(e) filing requirement in the fashion suggested by
21 Qwest, Congress could have very simply and easily included the same language that appears in
22 Section 251(a)(1) within Section 252(e) itself. The fact that it did not, indicates that Congress
23 intended no such limit on the agreements to be submitted to State commissions for approval.

24 Moreover, Section 251(a)(1) itself contradicts Qwest’s assertion that to be an interconnection
25 agreement, the agreement must contain an ongoing obligation under Sections 251 (b) or (c) of the
26

27 See May 28, 2004 letter from Christopher C. Kempley, ACC Chief Counsel to Todd Lundy, Qwest Counsel and Karen
Frame, Covad Counsel.

28 ² See June 8, 2004 letter from Todd Lundy to Christopher C. Kempley.

³ See August 13, 2004, Memorandum from Christopher C. Kempley to Colleen Ryan, Docket Control.

1 Federal Act. In this regard, Section 251(a)(1) specifically states that an ILEC such as Qwest may
2 negotiate and enter into a binding agreement with the requesting telecommunications carrier or
3 carriers "without regard to the standards set forth in subsections (b) and (c) of section 251." Thus,
4 the express wording of the statute itself states that a negotiated interconnection agreement does not
5 have to contain ongoing obligations relating to subsections (b) and (c) of section 251.

6 In Staff's view, Qwest should be given substantial credit for voluntarily agreeing to make line
7 sharing available to a competitor after line sharing is delisted as a network element. However, the
8 fact that Qwest **voluntarily** agrees to provide interconnection, access or a network element does not
9 make the agreement any less an "interconnection agreement." In this case, Qwest has voluntarily
10 agreed to provide line sharing to Covad after October 1, 2004, at terms and conditions agreed to by
11 both carriers, or "without regard to the standards set forth in subsections (b) and (c) of section 251 of
12 the Federal Act". There is no exception from the filing requirement in the Federal Act for agreements
13 in which the ILEC voluntarily agrees to provide interconnection or network elements to a CLEC.

14 Further, the second agreement is integrally related and intertwined with Qwest's
15 Interconnection Agreement with Covad, and the Amendment to their Interconnection Agreement filed
16 on May 14, 2004. There is no way to logically separate them, nor is there any apparent reason to
17 separate them other than to evade State jurisdiction and the State filing requirement.

18 **B. The FCC Is Given No Jurisdiction to Review and Approve Interconnection**
19 **Agreements Under the Federal Act Unless A State Fails to Act.**

20 Not surprisingly, Qwest cites no case law or controlling authority in support of its argument
21 that "there is an independent investiture of federal jurisdiction under the 1996 Act," for line sharing
22 orders placed after October 1, 2004. Qwest Motion at p. 8. Similarly, Qwest makes a broad
23 sweeping statement that "[i]n addition, the FCC has jurisdiction over contracts for non-251 network
24 elements that preempts the state commission from exercising jurisdiction or regulatory review over
25 such contracts." However, again, Qwest offered no legal support for this broad statement; which is
26 not surprising because there is no legal support for this statement.

27 Qwest gives several examples of why the FCC, and not the States, has jurisdiction over
28 interconnection, access or network elements in this case. Qwest relies upon: 1) the fact that certain

1 network elements may be subject to Section 271(c)(2)(B) of the Federal Act, 2) delisted elements are
2 subject to federal jurisdiction; and 3) elements that do not meet the necessary or impair test also fall
3 within the express federal filing jurisdiction, according to Qwest.

4 Qwest's reliance upon Section 271(c)(2)(B) is misplaced. It is correct that certain network
5 elements must continue to be made available under Section 271 of the Act, even in the absence of an
6 impairment finding by the FCC under Section 251(d)(2)(B) or the States under Section 252(d)(3).
7 However, the Federal Act is silent about any "investiture" of Federal jurisdiction if an element is
8 made available under Section 271 as opposed to Section 251(d)(2)(B). Quite to the contrary, Section
9 271(c)(2)(A) requires that the interconnection and access obligations of the Competitive Checklist be
10 contained within either a binding Statement of Generally Available Terms and Conditions ("SGAT")
11 or an interconnection agreement filed with and approved by the State commission. Qwest's
12 interpretations to the contrary notwithstanding, Section 271 contains no separate interconnection
13 agreement review and approval process by the FCC.

14 Similarly, there is no provision of the Federal Act that invests the FCC with jurisdiction to
15 review and approve ILEC/CLEC interconnection agreements containing delisted network elements or
16 elements that do not meet the "necessary" and "impair" tests under Section 251(d)(2)(B). Nor does
17 Qwest offer one.

18 Qwest also argues that "some network elements, particularly line sharing, are used
19 exclusively for the provision of services that fall within the Federal jurisdiction because they are
20 interstate in nature." Qwest Motion at p. 9. Qwest further argues that line sharing is within the
21 Federal jurisdiction because DSL service is jurisdictionally interstate irrespective of any provisions of
22 the Federal Act. This is one issue that the FCC has expressly addressed. In the *Local Competition*
23 *First Report and Order*, the FCC discussed its role with that of the States over local competition
24 matters:

25 "We conclude that, in enacting sections 251, 252, and 253, Congress created a
26 regulatory system that differs significantly from the dual regulatory system it
27 established in the 1934 Act. (cite omitted). That Act generally gave jurisdiction over
28 interstate matters to the FCC and over intrastate matters to the states. The 1996 Act
alters this framework, and expands the applicability of both national rules to
historically intrastate issues, and state rules to historically interstate issues. Indeed,
many provisions of the 1996 Act are designed to open telecommunications markets to

1 all potential service providers, without distinction between interstate and intrastate
2 services.

3 For the reasons set forth below, we hold that section 251 authorizes the FCC to
4 establish regulations regarding both interstate and intrastate aspects of interconnection,
5 services and access to unbundled elements. We also hold that the regulations the
6 Commission establishes pursuant to section 251 are binding upon states and carriers
7 and section 2(b) does not limit the Commission's authority to establish regulations
8 governing intrastate matters pursuant to section 251. **Similarly, we find that the
9 states' authority pursuant to section 252 also extends to both interstate and
10 intrastate matters.** Although we recognize that these sections do not contain an
11 explicit grant of intrastate authority to the Commission or of interstate authority to the
12 states, we nonetheless find that this interpretation is the only reasonable way to
13 reconcile the various provisions of sections 251 and 252, and the statute as a whole."
14 (Emphasis added).⁴

15 Thus, the FCC has found that the States' authority under Section 252 extends not only to
16 intrastate matters, but to interstate matters as well. Absent a States' failure to act, there is no "zone of
17 Federal jurisdiction" pertaining to the filing, review and approval of interconnection agreements that
18 is defined in the Federal Act. There is no "express Federal filing jurisdiction" set forth in the Federal
19 Act. Qwest's arguments in this regard should be rejected.

20 **C. There is No Federal Policy Favoring Market Agreements for Network Elements
21 That have Not Met the "Necessary" and "Impair" Test.**

22 Qwest also argues that there is a Federal policy favoring market agreements for network
23 elements that have not met the "necessary" and "impair" test. Qwest Motion at p. 9. Qwest goes on
24 to argue that this policy is "presumptively preemptive" of inconsistent State regulations because the
25 federal nature of the service under the Telecommunications Act automatically brings them into a
26 "zone of Federal jurisdiction." *Id.* Finally, Qwest argues that State filing and review requirements
27 are not permissible because they are inconsistent with this preemptive Federal policy. *Id.* Staff is not
28 aware, of a Federal policy favoring market agreements for elements not meeting the "impair" or
"necessary" standard, and that this Federal policy is presumptively preemptive of inconsistent State
regulations. In fact, the FCC has only recently sought comment on this issue in its recent Interim

⁴ See *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, Cc Docket No. 96-98, First Report and Order, 11 FCC Rcd 15499 (1996) ("Local Competition First Report and Order"), *aff'd in part and vacated in part sub nom. Competitive Telecommunications Ass'n v. FCC*, 117 F.3d 1068 (8th Cir. 1997), *aff'd in part and vacated in part sub nom. Iowa Utils. Bd. v. FCC*, 120 F.3d 743 (8th Cir. 1997), *aff'd in part, rev'd in part, and remanded subnom. AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366 (1999) ("Iowa Utilities Board").

1 Unbundling Order and accompanying Notice of Proposed Rulemaking.⁵ Further, as a general matter,
2 the FCC has gone to great lengths not to preempt State jurisdiction except where warranted based
3 upon case by case determinations.

4 In its recent *Qwest Declaratory Ruling*, the FCC stated:

5
6 “Based on their statutory role provided by Congress and their experience to date, state
7 commission are well positioned to decide on a case-by-case basis whether a particular
8 agreement is required to be filed as an “interconnection agreement” and, if so, whether
9 it should be approved or rejected. Should competition-affecting inconsistencies in
10 state decisions arise, those could be brought to our attention through, for example,
11 petitions for declaratory ruling. The statute expressly contemplates that the section
12 252 filing process will occur with the states, and we are reluctant to interfere with their
13 processes in this area. Therefore, we decline to establish an exhaustive, all-
14 encompassing ‘interconnection agreement’ standard. The guidance we articulate today
15 flows directly from the statute and services to define the basic class of agreements that
16 should be filed. We encourage state commissioners to take action to provide further
17 clarity to incumbent LECs and requesting carriers concerning which agreements
18 should be filed for their approval. At the same time, nothing in this declaratory ruling
19 precludes state enforcement action relating to these issues.

13 * * * * *

14 Consistent with our view that the states should determine in the first instance which
15 sorts of agreements fall within the scope of the statutory standard, we decline to
16 address all the possible hypothetical situations presented in the record before us.”

16 *Qwest Declaratory Ruling* at paras. 10 and 11.⁶

17 Accordingly, it hardly appears that the FCC has preempted the States with respect to
18 determinations regarding the Section 252 filing obligation, as Qwest argues.

19 **D. The Federal Act Does Not Carve Out Any Exception to the Section 252(e) Filing
20 Requirement for What Qwest Calls a “Commercially Negotiated” Agreement.**

21 Staff is not aware, nor has Qwest identified, any provision in the Federal Act which defines
22 “commercially negotiated” agreements and carves them out of the filing requirements of Section
23 252(e). This is merely a fiction created by Qwest and the RBOCs to escape their State filing
24 obligation under the Federal Act.

26 ⁵ *In the Matter of Unbundled Access to Network Elements and Review of the Section 251 Unbundling Obligations of
27 Incumbent Local Exchange Carriers*, WC Docket No. 04-313 and CC Docket No. 01-338, Order and Notice of Proposed
28 Rulemaking (Rel. August 20, 2004).

⁶ *In the Matter of Qwest Communications International, Inc., Memorandum Opinion and Order*, 17 FCC Rcd. 19337 at
para. 8 (rel. October 4, 2002)(“*Qwest Declaratory Order*”).

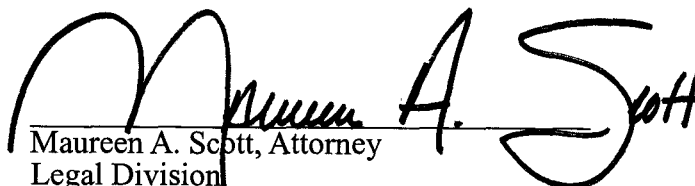
1 Indeed, in its recent *Qwest Declaratory Ruling* involving 252(3) filing obligations, the FCC
2 expressly identified only a few exceptions to the Section 252(e) filing obligation. Those included
3 settlement agreements, order and contract forms completed by carriers to obtain service pursuant to
4 terms and conditions set forth in an interconnection agreement and agreements with bankrupt
5 competitors that are entered into at the direction of a bankruptcy court or trustee and do not otherwise
6 change the terms and conditions of the underlying interconnection agreement. See *Qwest*
7 *Declaratory Ruling* at paras. 12, 13, and 14.

8 The Commission should reject Qwest's fictitious carve-out for "commercially negotiated"
9 agreements and Qwest's attempt to once again evade the Federal Act's filing requirements.

10 **III. CONCLUSION**

11 The Commission should deny Qwest's Motion to Dismiss Staff's request for filing and review
12 under Section 252 of the Federal Act, the commercial line sharing agreement between Qwest and
13 Covad. The Commission should rule that the agreement is an interconnection agreement subject to
14 filing under the Federal Act and the Arizona Administrative Code.

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16 RESPECTFULLY submitted this 5th day of October, 2004.

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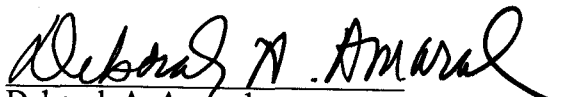
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